UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	15-CV-2627 (JA)(RLM)

PLAINTIFF'S OBJECTION TO THE CHIEF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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Pursuant to Federal Rule of Civil Procedure 72(b), *pro se* Plaintiff Louis Flores ('Plaintiff') objects to the Chief Magistrate Judge's Report and Recommendation (the 'Report and Recommendation') filed on 04 October 2016. (Doc. No. 48). On 06 October 2016, Plaintiff had requested an extension of time to file his objection. (Dkt. No. 49). After Plaintiff made his request for an extension of time, Counsel for Defendant U.S. Department of Justice provided consent to Plaintiff's request. (*See* Ex. A). The Court granted on 11 October 2015 by Minute Order Plaintiff's request for an extension of time. Plaintiff timely files herewith his Objection to the Report and Recommendation, in accordance with the extension of time granted by the Court.

INTRODUCTION

Plaintiff filed the First FOIA Request on 30 April 2013. (Dkt. No. 12 at Ex. II to Ex. C).[1/] Plaintiff filed the Complaint initiating this litigation on 05 May 2015. (Dkt. No. 1). Plaintiff filed an Amended Complaint on 23 September 2015. (Dkt. No. 15). Plaintiff filed the Second FOIL Request on 20 October 2015. (Flores Decl., Ex. G). Plaintiff has been trying to find every way possible to get Defendant U.S. Department of Justice ('Defendant,' the 'Government,' the 'Agency', or the 'DOJ') to disclose the requested records, even mounting protests supported by a social media campaign, as documented in the Complaint. (Dkt. No. 15, ¶¶ 54-6). All of this has been to no avail. Plaintiff came to U.S. District Court to seek help. The Eastern District is home to the Hon. U.S. District Court Judge Raymond Dearie, who used to serve as the U.S. Attorney for the Eastern District and who made a name for His Hon. Self by fighting political and campaign corruption whilst he was the U.S. Attorney. As U.S. Attorney Preet Bharara has said numerous times, the work for reform and to fight corruption cannot solely rest on prosecutors, but must involve a civic role. That civil involvement will need to include activists, and the goal of the two FOIA requests (the 'Free Speech FOIA Requests') filed by Plaintiff has been to seek records to determine

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1/ In Declaration of Plaintiff, Plaintiff stated, "Except for minor and reasonable allowances for typographical errors, I ratify as facts all of the statements made by Plaintiff in all of the documents filed by Plaintiff in the docket with this Court, and I attest to all documents filed by Plaintiff in the docket with this Court as true and correct copies of such documents." (Flores Decl., ¶ 3).

whether activists can play this crucial role without retaliation. Plaintiff offers this background to give some context to this litigation.

In the First FOIA Request, it was noted that Plaintiff requested the documents "on the grounds that disclosure of the requested records is in the public interest, because it 'is likely to contribute significantly to public understanding of operations or activities of the government and is not primarily in the commercial interest of the requester.' " (Dkt. No. 12 at Ex. II to Ex. C at 8). The records Plaintiff has been seeking will only be disclosed at the discretion of this Court, because, as the DOJ has admitted and as the Chief Magistrate Judge has acknowledged, the DOJ only releases records in response to FOIA requests upon orders of the Court.

The Chief Magistrate Judge granted the Motion for Summary Judgment filed by Defendant. (Dkt. No. 20). The Chief Magistrate Judge also denied Plaintiff's Motion for Partial Summary Judgement and Motion for Penalties and Sanctions. (Dkt. Nos. 24, 25). The Chief Magistrate Judge erred by :

- Failing to set forth the relevant facts ;
- Making a narrow reading of the First FOIA Request ;
- Selecting facts and Exhibits that were prejudicial against Plaintiff ;
- Ruling that the DOJ met the legal standard for summary judgment ;
- Determining that the DOJ had made a good faith search to answer the First FOIA Request ;
- Erring by failing to fully consider Plaintiff's allegations that documents have been withheld by the DOJ.
- Concluding that Plaintiff failed to demonstrate that the DOJ wilfully violated FOIA, even though it was the Chief Magistrate Judge, who denied Plaintiff's request for Discovery to prove the DOJ's wilful violations of FOIA
- Disregarding the standard used to determine when the Freedom of Information Act ('FOIA') compels an agency to disclose its working law ;
- Concluding that the DOJ does not have to produce any records of costs, as requested in the First FOIA Request ;
- Failing to analyse the devastating, negative implications on FOIA, particularly given the DOJ's admissions that it does not comply with FOIA until a Court orders compliance ;

- Ignoring the devastating, negative implications on the First Amendment, particularly given the DOJ's admissions that it does not comply with FOIA until a Court orders compliance ; and
- Casting aspersions on pro se Plaintiff in order to recommend summary judgment for the DOJ.

Accordingly, the Court should decline to adopt the Report and Recommendation. Instead, the Court should vacate the reference of the civil matter to the Chief Magistrate Judge, review Plaintiff's motions *de novo*, and sustain Plaintiff's objections and grant Plaintiff's Motion for Partial Summary Judgment and Motion for Sanctions and Penalties.

STANDARD OF REVIEW

I. Reports and Recommendations

The Chief Magistrate Judge makes only a suggestion to this Court. The advice in the Report and Recommendation has no presumptive weight. The responsibility for making a final disposition remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a *de novo* determination of any portions of the Report and Recommendation to which specific objections are made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Chief Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1). *See also* Fed. R. Civ. P. 72(b). The Court may also vacate the reference of the civil matter to the Chief Magistrate Judge. *See* Fed. R. Civ. P. 73(b)(3).

II. Summary Judgment

Summary judgment is only warranted when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) ; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In determining whether summary judgment is appropriate, all ambiguities and reasonable inferences are resolved against the moving party. *Nova Cas. Co. v. Liberty Mut. Ins. Co.*, 540 F. Supp. 2d 476, 481 (S.D.N.Y. 2008). Thus, if there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-movant on a material issue of fact, summary judgment is improper. *See Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 33 (2d Cir. 1997).

III. FOIA

FOIA was signed into law by President Lyndon Johnson on July 4, 1966. Pub. L. 89-487 (1966). FOIA's purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 352, 261 (1976).

FOIA requires agencies to promptly provide a response to requests for documents, duly made, or to provide justification why the documents may be exempt from production. *See* 5 U.S.C. § 552 (2004). Under FOIA, the Government is also obligated to release a "general index of records" of records "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D), (E). Plaintiff complains that this law has not been observed. This Court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaintant." *See* 5 U.S.C. § 552(a)(4)(B). There is no legal controversy over Plaintiff's right to demand that the DOJ be in compliance with FOIA, and the only documents subject to Exemption are the privacy-encumbered records (the 'Exempted Records') withheld by the DOJ from the First FOIA Response (the 'Red Herring Response') pertaining to Lt. Daniel Choi ('Lt. Choi)', for which Plaintiff has requested a *Vaughn* Index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (PL 56.1 Answer at ¶ 8.1e). (Flores Decl., Ex. F).

IV. The First Amendment

This Court has original subject matter jurisdiction under 28 U.S.C. § 1331, as this matter arises under the Constitution, laws, or treaties of the United States.

The U.S. Supreme Court has established the right by "a reporter or an ordinary citizen" to "claim access to places like prisons, records, or channels of communication"[2/] in respect of the judicial system, and in these cases, the U.S. Supreme Court has "upheld rights

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2/ Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 Sup. Ct. Rev. 1.

of access in a number of settings, including judicial proceedings."[3/] [4/] "[O]ur Constitution, and specifically the First Amendment to the Constitution ... protects the public's right to have access to judicial documents." *See United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014). *See also* U.S. Const. amend. I.. The intention of the Free Speech FOIA Requests is for Plaintiff to access *judicial documents* that evidence the legal basis of the Government's prosecution of activists.

As a consequence of the DOJ's pattern and practice of violating FOIA with impunity, Plaintiff has suffered actual adverse and harmful effects, including, but not limited to, a *de facto* prohibition on publishing information about the Government's prosecution of activists, which is tantamount to prior restraint, which is unconstitutional. *Near v. Minnesota*, 283 U.S. 697 (1931). The DOJ's actions deny Plaintiff the ability to make this information available to the public and to Plaintiff's readers, resulting in the creation of a chilling effect on speech from Defendant's failure to comply with FOIA.

ARGUMENT

I. The Chief Magistrate Judge did not set forth the relevant facts

A. The Chief Magistrate Judge unjustly and narrowly construed the First FOIA Request.

The position of the Chief Magistrate Judge is based on a distortion of the record. In the Report and Recommendation, the Chief Magistrate Judge acknowledged that the First FOIA Request was "extensive." (Dkt. No. 48 at 3). The First FOIA Request comprised 18 itemized requests. (Dkt. No. 12 at Ex. II to Ex. C). (PL 56.1 Answer, ¶ 8). Plaintiff has been seeking a complete itemized accounting by the DOJ for these 18 items. (Flores Decl., Ex. I at ¶ 1(i)). This request for itemization was also raised in the memorandum in support of Plaintiff's Motion for Partial Summary Judgment. (Dkt. No. 24 at 26). However, the Chief Magistrate Judge narrowly construed the requests to only number 4. (Dkt. No. 48 at 3). The Chief Magistrate Judge's unjustly narrow construct of the First FOIA Request deprives

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3/ *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ; *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982) ; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

4/ Phillip J. Cooper, *Rusty Pipes : The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 359 (1992).

Plaintiff of the records that were expressly requested in writing. No amendment of the First FOIA Request has ever been made in writing. As a consequence of the Chief Magistrate Judge's error to fully recognise all of the items listed with "the four corners" of the First FOIA Request, the Court should reject the Report and Recommendation.

B. Exhibits and facts set forth by the Chief Magistrate Judge are prejudicial against Plaintiff's arguments.

The position of the Chief Magistrate Judge in the Report and Recommendation is based on Exhibits that should not be cited. In the Report and Recommendation, the Chief Magistrate Judge referred to one of Plaintiff's documents, but the Chief Magistrate Judge cited the document produced by Counsel for Defendant, instead of the copy of the document entered by Plaintiff. (Dkt. 48 at 4). This is a highly problematic situation, and the credibility of the DOJ's Exhibits have been questioned by Plaintiff, and the Chief Magistrate Judge has been made plainly aware of the questions about the credibility about the Government's Exhibits. For a period of time, Plaintiff was represented by counsel, Willkie Farr & Gallagher LLP ('Plaintiff's Counsel'), which filed an appeal with the Office of Information Policy (the 'OIP') (Appeal No. AP-2014-00890) (the 'FOIA Appeal'). (Flores Decl., Ex. A at 2). (PL 56.1 Answer ¶ 16). The copy of the FOIA Appeal entered into the record by the DOJ was incomplete. (Singh Decl., Ex. G). The DOJ's copy of the FOIA Appeal is missing the e-mail sent by Plaintiff's Counsel, which transmitted the FOIA Appeal as an attachment. (Flores Decl., Ex. A at 1). In the memorandum in support of Plaintiff's Cross-Motion for Sanctions, Plaintiff made an issue of how the DOJ deliberately removed evidence that showed a document was attached to another e-mail that was entered into the record by the DOJ in another Exhibit. (Dkt. No. 35 at 34).

Plaintiff draws the Court's attention to another of the Government's Exhibits, one which purports to be a hardcopy of Plaintiff's e-mail transmitting the electronic copy of the First FOIA Request. (Singh Decl., Ex. F). The Court will note that this copy, which was sworn to be "a true and correct copy" by Counsel for the DOJ, is lacking or was stripped of any indication that an electronic copy of the First FOIA Request was attached, as is normally indicated in hardcopy print-outs of e-mails with attachments. *See, e.g.*, Flores

Decl., Ex. JJ, which is the whole document (showing that an attachment was included in the e-mail). The Court will note that the DOJ acknowledged receiving a copy of the e-mail attached to which was the First FOIA Request. (Flores Decl., Ex. RR). Because the Chief Magistrate Judge chose to cite the Government's incomplete copy of Plaintiff's Counsel's FOIA Appeal because of "pagination," the Court, in reviewing the Report and Recommendation, will be being referred to an incomplete document. (Dkt. No. 48 at 3, n.1). The credibility of some of these documents are in question due to their incompleteness. It is not known why the Chief Magistrate Judge, in spite of these questions of credibility, would include in the Report and Recommendation references to documents that are known to be incomplete. A dispute exists between Plaintiff and Defendant over Defendant's intent with respect to introducing incomplete documents into evidence. As the Court reviews the Report and Recommendation, Plaintiff cautions the Court to find the comparable Exhibit submitted by Plaintiff for the complete copy, particularly for documents authored by Plaintiff or Plaintiff's Counsel, which Plaintiff has sworn to be complete and true copies.

Separately, Chief Magistrate Judge cited another document ; this one was authored by Plaintiff : Plaintiff's Index of References to Records Requested under FOIA Request. (Dkt. No. 48 at 6). And again, the Chief Magistrate Judge cited the copy entered into the record by Counsel for the Defense instead of the copy entered into the record by Plaintiff. (Singh Decl. Ex. J). (Flores Decl., Ex. L). Weight should not be being given documents entered into the record by Counsel for the Defense, particularly given the Government's propensity to introduce incomplete documents, and especially when the Exhibits in question originated from Plaintiff or Plaintiff's Counsel. When looking at documents that were authored by Plaintiff or Plaintiff's Counsel, the Court should look to copies of Exhibits entered into the record by Plaintiff. If the Chief Magistrate Judge meant to imply that the sworn Exhibits authored and submitted by Plaintiff are in question, then why didn't the Chief Magistrate Judge raise any concerns prior to issuing the Report and Recommendation ? By not citing Plaintiff's Exhibits, the Chief Magistrate Judge is making an implied connotation about the sworn Exhibits authored and submitted by Plaintiff, and

that connotation is prejudicial against the Plaintiff. The Court must reject the Report and Recommendation for that implied prejudice.

The Chief Magistrate Judge also accepted as fact assertions made by the DOJ that are in dispute and have, at times, been disproved. For example, in the Report and Recommendation, the Chief Magistrate Judge cited a passage from the Joint Status Report wherein Defendant declared that "all non-exempt records responsive to [P]laintiff's FOIA request to EOUSA that is the subject of this action ha[d] been released to [P]laintiff." (Dkt. No. 48 at 6). That statement turned out to be false, because the DOJ later produced documents responsive to the First FOIA Request, namely, when it produced correspondence between the DOJ and U.S. Representative Mark Pocan (D-Wisconsin). (Exs. to Van Horn Decl.). Furthermore, there remain six boxes of records in the possession of the U.S. Attorney's Office for the District of Columbia that, despite Plaintiff's request for a *Vaughn* Index, the Court has overlooked to mention. (Van Horn Decl., ¶ 11). (Dkt. 43 at 3-4). Therefore, all responsive documents have not been disclosed, and Plaintiff will identify still yet other responsive documents that have not been disclosed below.

The Chief Magistrate Judge also stated that, ". . . [D]efendant has reviewed the entire [Lt.] Choi prosecution file and identified no responsive records." *Id*. at 29. But as stated below, there is no certainty that the DOJ provided "all non-exempt records," and, what is more, the Chief Magistrate Judge overlooked other requests, such as the documents that were listed on Plaintiff's Index of References to Records Requested under FOIA Request that were not answered by the DOJ. (Flores Decl., Ex. L). (Plaintiff has argued in the pleadings, as mentioned in Section VII. below, that the DOJ must fully answer Plaintiff's Index of References to Records Requested under FOIA Request.) The Chief Magistrate Judge also raised the issue of the documents missing from the Red Herring Response. (Dkt. No. 48 at 8). However, the Chief Magistrate Judge appeared to fail to directly address the open issue of the missing records in the Report and Recommendation. The presentation of facts made by the Chief Magistrate Judge gives the Court a false impression. As a consequence of the Chief Magistrate Judge's errors, including failing to address the

documents missing from the Red Herring Response, the Court should reject the Report and Recommendation.

II. The Chief Magistrate Judge ruled incorrectly that the DOJ met the legal standard for summary judgment

A. The Chief Magistrate Judge ignored genuine disputes of material facts.

Summary judgment is only warranted when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) ; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, the Chief Magistrate Judge ignored the absence of material facts. (PL 56.1 Answer ¶¶ 13, 25, 27-28, 32-38, 43, 46-50, 53-55, 75, and 81.). The absence of material facts was sworn to by Plaintiff in a Declaration. (Flores Decl., ¶¶ 4(A)-(P)). Plaintiff has disputed, contested, objected, or dispelled various aspects of Defendant's 56.1 Statement, an issue that the Chief Magistrate Judge left unaddressed in the Report and Recommendation. (PL 56.1 Answer ¶¶ 2, 7-10, 14, 16-17, 20, 23-24, 26, 29-31, 39-41, 43-45, 51-52, 59-63, 65, 79-80, and 82-83.). Because the Chief Magistrate Judge did not resolve the genuine disputes of material facts, the Report and Recommendation should not have granted summary judgment to the DOJ, and the Court should reject the Report and Recommendation.

B. The Chief Magistrate Judge resolved all ambiguities and reasonable inferences against the non-moving party.

In determining whether summary judgment is appropriate, all ambiguities and reasonable inferences are resolved against the moving party. *Nova Cas. Co. v. Liberty Mut. Ins. Co.*, 540 F. Supp. 2d 476, 481 (S.D.N.Y. 2008). Instead, the Chief Magistrate Judge resolved all ambiguities against the non-moving party. For example, the dispute over the introduction of suspect documents as Exhibits by Counsel for the DOJ was not resolved against the moving party in the Report and Recommendation, despite the blatant differences between the documents introduced by Counsel by the DOJ and by Plaintiff. (Dkt. No. 25 at 20-23). The issue over the dispute as to whether Plaintiff's e-mail to the DOJ contained the First FOIA Request goes to the heart of Plaintiff's argument that the DOJ made a material misrepresentation to the Court when the DOJ claimed that it never had a

copy of the First FOIA Request. *Id*. Because the Chief Magistrate Judge refused Plaintiff's request for Discovery, it is not known on what basis the Chief Magistrate Judge is reaching conclusions about the dispute over whether the DOJ made misrepresentations during proceedings before this Court. Consequently, the Court must reject the Report and Recommendation.

C. The Chief Magistrate Judge ignored evidence in the record from which reasonable inferences could be drawn in favor of the non-moving party.

If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-movant on a material issue of fact, summary judgment is improper. *See Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 33 (2d Cir. 1997). It is not in dispute that the DOJ was not in compliance with FOIA prior to and throughout this litigation. Plaintiff protested the DOJ's failure to answer the First FOIA Request in the dispositive motions filed by Plaintiff. Plaintiff noted that the DOJ had a duty to preserve and process FOIA requests. (Dkt. No. 25 at 31-3). Yet, after the DOJ claimed to have mysteriously lost the First FOIA Request, the Chief Magistrate Judge made no effort to determine why the DOJ either destroyed or lost the First FOIA Request. Plaintiff showed that Angela George, an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia ('George'), had a copy of the First FOIA Request all along. (Dkt. No. 25 at 33-34). Yet, the Chief Magistrate Judge made no effort to consider that the DOJ was acting in bad faith by refusing to process the First FOIA Request, particularly since Plaintiff commenced this litigation after attempts to obtain information from George were unsuccessful, and, all the more peculiar, since George was the prosecutor for one of the activists principally named in the First FOIA Request, Lt. Choi. It could be reasonably be inferred that the DOJ was acting in bad faith by either destroying or losing the First FOIA Request and by claiming that it never had a copy of the First FOIA Request, when George had a copy of the First FOIA Request all along. Because the Chief Magistrate Judge never -- *not even once* -- considered making reasonable inferences from the evidence presented by Plaintiff in favor of Plaintiff, the Court must reject the Report and Recommendation.

III. The Chief Magistrate Judge did not fully consider Plaintiff's allegations that documents have been withheld by the DOJ.

The DOJ does not dispute that it has never provided an explanation for why it never responded to the First FOIA Request. For over two years, the DOJ neither released any records nor explained to Plaintiff the reasons for the DOJ's failure to release records. (Dkt. 9 ¶ 27). The Government even made a substantive misrepresentation to the Court during this litigation when it claimed to have never received the First FOIA Request. (Dkt. No. 9 at ¶ 4, 8, and 34-38). (Dkt. No. 17 at ¶ 4, 8, and 34-38). The Government's nonresponse, its misrepresentations, its failure to provide a *Vaughn* Index for the records withheld from the Red Herring Response (the 'Withheld Records'), and its other failures to provide requested documents constitute a "No Number, No List" response, or a *Glomar* response. (Dkt. No. 24 at 11-5). The Chief Magistrate Judge rejected Plaintiff's arguments, but the Chief Magistrate Judge never provides another description for the DOJ's noncompliance with FOIA.

The Chief Magistrate Judge rejected Plaintiff's assertion by giving credibility to the DOJ's "outright denial that responsive records could be found." (Dkt. No. 48 at 21, n.11). The Chief Magistrate Judge cited case law. "*See Wilner v. NSA*, 592 F.3d 60, 67 (2d Cir. 2009) (defining *Glomar* response as 'refus[al] to confirm or deny the existence of certain records') ; *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 105 (2d Cir. 2014) ('A no number, no list response *acknowledges the existence of documents responsive to the request*, but neither numbers nor identifies them by title or description.' (emphasis added))." *Id*.

However, the DOJ and the Court have acknowledged records that Plaintiff has requested but that Defendant has refused to address or that the Chief Magistrate Judge has mysteriously tried to explain away. Consequently, Defendant's silence on these records and the Chief Magistrate Judge's failure to either number or identify these records proves that the DOJ is providing a *Glomar* response in the subject litigation.

The DOJ has acknowledged that there exist Exempted Records, which were withheld from the Red Herring Response, for which Plaintiff has requested a *Vaughn* Index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (PL 56.1 Answer at

¶ 8.1e). Because the DOJ has refused to provide a *Vaughn* Index, the Exempted Records have received a No Number, No List treatment. Confirmation that the Exempted Records are truly exempt is particularly necessary, given the DOJ's misconduct prior to the commencement of this action and during proceedings before this Court. After all, it is DOJ's burden to show that an exemption properly applies. *See Brennan Ctr. For Justice v. DOJ*, 697 F. 3d 184, 201-02 (2d Cir. 2012). Moreover, the DOJ admitted that six boxes of records exist for the prosecution file in respect of Lt. Choi. (Van Horn Decl., ¶ 11). Because the DOJ has refused to provide a *Vaughn* Index for these six boxes of records, the these six boxes of records have received a No Number, No List treatment. For having failed to force the Government to number or identify the existing but undisclosed records, the Chief Magistrate Judge's Report and Recommendation must be rejected.

The position of the Chief Magistrate Judge is also based on a distortion of the record. The Chief Magistrate Judge found that the DOJ has conducted an adequate search. On the contrary, Plaintiff has argued time and again that other records exist or that it is highly likely that other records exist. The Declarant admitted that six boxes of records exist for the prosecution file of Lt. Choi. (Van Horn Decl., ¶ 11). As the Court will note, the Red Herring Response produced by Defendant to the First FOIA Request solely comprised 331 pages, less than it would take to fill one Redweld. (Flores Decl., Ex. F). What about these other records ? Why haven't they been produced by the DOJ ? How can the Chief Magistrate Judge just ignore records that the DOJ has admitted exist -- but won't produce ?

The DOJ has a duty to comply with FOIA, and when the DOJ breaches that duty, it is acting in bad faith. That bad faith act of noncompliance raises questions about the DOJ's credibility in proceedings before this Court. At least twice, Plaintiff has requested an index of the Exempted Records withheld from the Red Herring Response, but the DOJ has not produced such an index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)-(ii)). (Singh Decl., Ex. N). The request of a *Vaughn* Index is used to, amongst other things, identify each document and to, essentially, confirm the correct application of Exemptions. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974). *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n. 1 (9th Cir. 1995). The DOJ's failure

to provide such a routine index that can reasonably be expected would be requested to confirm the correct application of Exemptions points to the degree to which the DOJ has been uncoöperative and/or hindering the Free Speech FOIA Requests. The DOJ's willingness to breach its duty to comply with FOIA means that the Court must now intervene, particularly since the Chief Magistrate Judge has refused to grant Plaintiff's request for a *Vaughn* Index for the existing but withheld records.

Some of the records produced by the DOJ indicate that responsive records exist or likely exist. For example, when the Federal Bureau of Investigation ('FBI') begins an investigation of activists under one of the guidelines produced by the DOJ, the FBI will consult with an U.S. Attorney. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. Under the same section, there is legal advice given to the DOJ by the U.S. Department of State (the 'DOS') about criminal charges being disposed under local law. The legal advice from the DOS must be produced, because the DOJ has not invoked any Exemption for the legal advice. The legal advice from the DOS exists, governs during demonstrations, and the legal advise from the DOS must be produced. Yet, the Chief Magistrate Judge rejected Plaintiff's demand. Because the Chief Magistrate Judge advocated against the release of responsive records, the Report and Recommendation must be rejected.

Furthermore, all the records that are likely to be being created under the relevant sections of the United States Attorneys' Manual must also be produced. *See, e.g., U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.882. These known procedures referenced in the United States Attorneys' Manual that are likely creating records act defeat the Government's ability to maintain its *Glomar*-equivalent response with respect to the line-items in the First FOIA Request, particularly in respect of the first sub-item under request 1. (PL 56.1 Statement, ¶ 8(a)(i)). Thus, it is *substantively questionable* that the DOJ is being truthful when it asserted that there were no responsive records. (Dkt. No. 20 at 5). These records exist, like the legal advice from the DOS, or else they are likely to exist, like from the procedurs noted in sections from the United States Attorneys' Manual. Despite

this evidence, that the Chief Magistrate Judge refused to suggest the disclosure of these records, the Court must now reject the Report and Recommendation.

The position of the Chief Magistrate Judge has been that Plaintiff conceded that the provision of one of the sections from the United States Attorneys' Manual only relates to the property owned by foreign governments. (Dkt. No. 48 at 13). Plaintiff plainly stated that that kind of conclusion could not be made, because Plaintiff said during Oral Arguments that, "Actually, I don't know, because I don't know what the Department of State legal guidance says." Transcript of Proceedings Held on July 11, 2016 (July 25, 2016) ("7/11/16 Tr."). (Dkt. No. 35 at 31:12–25). The Chief Magistrate Judge again reached conclusions about records likely being created from procedures noted in sections from the United States Attorneys' Manual without the benefit of even conducting an inquiry of Defendant. "The same is true of other supposedly responsive documents identified by [P]laintiff, . . . none of which contains policy guidelines concerning the prosecution of activists, and all of which have now been produced to plaintiff in any case" . . . . (Dkt. No. 48 at 28). The Chief Magistrate Judge cited case law for this conclusion, but the Chief Magistrate Judge did not cite anything in the records that shows that such documents were produced. How the Chief Magistrate Judge could make findings about what the legal guidance from the DOS could say, or whether or not there are records that are likely being created by the relevant sections from the United States Attorneys' Manual, without having a chance to inspect the legal guidance -- all without conducting an inquiry -- is not known. The Chief Magistrate Judge's conclusions about the legal guidance from the DOS, the records that are likely being created by relevant sections from the United States Attorneys' Manual, and the Chief Magistrate Judge's selective recounting of Plaintiff's statements, are not supported by the record. Consequently, the Court should reject the Report and Recommendation.

IV. The Chief Magistrate Judge blamed Plaintiff for failing to demonstrate that the DOJ wilfully violated FOIA, even though it was the Chief Magistrate Judge, who denied Plaintiff's request for Discovery to prove the DOJ's wilful violations of FOIA.

The position of the Chief Magistrate Judge is unsupported and based on a distortion of the record. In the Report and Recommendation, it was noted that :

> Specific to the FOIA context, to prevail on a motion for summary judgment, the defending agency must show that "its search was adequate and that any withheld documents fall within an exemption . . . ." *Davis v. U.S. Dep't of Homeland Sec.*, No. 11–CV–203 (ARR)(VMS), 2013 WL 3288418, at *6 (E.D.N.Y. June 27, 2013) (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)) ; *see also* 5 U.S.C. § 552(a)(4)(B).

(Dkt. No. 48 at 18). However, the DOJ has withheld documents for which no Exemption has been claimed. The only documents for which the DOJ has withheld for which Exemptions have been claimed are the Exempted Documents that were not included in the Red Herring Response. Moreover, the Chief Magistrate Judge interpreted FOIA to be a weak law, and her resignation about FOIA's weakness, despite having given some measure of lip service to FOIA's bias toward transparency, is used against Plaintiff. When the Chief Magistrate Judge wrote that :

> Agencies have no obligation, for example, to "search every record system[,]" *Judicial Watch II*, 2016 WL 1367731, at *2, or use "all possible variants of a particular name or [search] term[,]" *Conti*, 2014 WL 1274517, at *15; see also *Judicial Watch II*, 2016 WL 1367731, at *5.

the Chief Magistrate Judge was resigning this Court to the lowest possible standard for Government transparency. (Dkt. No. 48 at 20). To paraphrase an old Cabaret song, Chief Magistrate Judge Roanne Mann was essentially pouring water on a drowning FOIA.

The Chief Magistrate Judge also noted that, "... [I]t is settled law that delayed responses to FOIA requests do not, without more, establish bad faith, see *Amnesty Int'l*, 2008 WL 2519908, at *9 (citing *Meeropol*, 790 F.2d at 952) ...." *Id*. at 30. However, the fact pattern in *Meeropol v. Meese* was substantively different from this litigation. In the opinion in *Meeropol*, the D.C. Circuit Court excused the agency's failure to comply with FOIA, because the FOIA request that was the subject matter of that case "was perhaps the most extensive FOIA request ever made" at that time then and because "the FBI in 1975

lacked experience implementing FOIA and the 1974 FOIA amendments."[5/] *See Meeropol v. Meese*, 790 F.2d 942 (D.C. Cir. 1986). In this day and age, the DOJ is highly experienced with FOIA, so much so, that it exploits FOIA to delay compliance and to use the Courts to make the process "protracted" for Plaintiffs, as with the Plaintiff in this litigation. Factually, the Court must consider the differences in conditions faced by the Agency. Since the Agency did not face disadvantages processing the First FOIA Request as a consequence of the Agency's unlawfully narrow reading of the First FOIA Request and because the Agency is more experienced with FOIA, the Agency has no excuse under common law to explain away its failure to comply with FOIA, and the Chief Magistrate Judge erred by not considering the different fact patterns between the DOJ of 1975 and the DOJ of 2016. Because the Chief Magistrate Judge did not consider the DOJ's expertise and experience with FOIA in the time since *Meeropol*, the Court must reject the Report and Recommendation.

The Chief Magistrate Judge thrice maintained in the Report and Recommendation that an agency need not look beyond "the four corners" of a FOIA request in conducting its search and preparing its response. But Plaintiff has repeatedly protested the inadequacies, sometimes deliberate, of the DOJ's searches and responses. The DOJ has not provided an itemised search of all of the 18 request items within "the four corners" of the First FOIA Request, and the Chief Magistrate Judge knows that. (PL 56.1 Answer, ¶ 8.1). How can the Chief Magistrate Judge invoke a boundary of "the four corners" of a FOIA request, when the DOJ won't even respect "the four corners" ? The Chief Magistrate Judge has, for own Hon. Self, not respected "the four corners" of the First FOIA Request by first ignoring the 18 itemised requests and by ignoring the other names of activists, besides Lt. Choi, that appear on the First FOIA Request. For the Chief Magistrate Judge's frivolous failure to acknowledge that the DOJ violated FOIA by refusing to answered the 18 request items on

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5/ Plaintiff apologises to the Court, but Plaintiff can only access reported cases through Google searches, and, as such, Plaintif fis unable to provide a proper citation to the actual pages where these quotes are printed. *See Michael MEEROPOL, a/k/a Rosenberg, et al., Appellants v. Edwin MEESE III, Attorney General of the United States, et al.*, Open Jurist, http://openjurist.org/790/f2d/942/meeropol-v-meese-iii.

the First FOIA Request and by ignoring the names of other activists, the Court must reject the Report and Recommendation.

Other misconduct on the part of the DOJ, such as destroying or losing the First FOIA Request, the DOJ's misrepresentation that it did not receive the First FOIA Request even though George had received a copy of the First FOIA Request, and the introduction of suspect documents into evidence forced Plaintiff to file a Cross-Motion for Sanctions and to request the conduct of limited Discovery. *See*, generally, Plaintiff's Cross-Motion for Sanctions. (Dkt. No. 25 at 14-37). However, the Chief Magistrate Judge has ruled against Plaintiff's request. To justify that recommendation, the Chief Magistrate Judge based her decision on the fact that the Declarations of the DOJ are accorded "a presumption of good faith." (Dkt. No. 48 at 20-1). However, the record shows that the Declarations were inadequate, because the Chief Magistrate Judge made a determination following Oral Arguments that, "the [D]eclarations previously filed by the [G]overnment do not contain all of the details provided by [D]efense [C]ounsel at [O]ral [A]rgument." (Dkt. No. 37 at 1). The Chief Magistrate Judge found the Declarations to be inadequate, because Plaintiff argued that the Declarations were inadequate. (Dkt. No. 25 at 31-37). Because the DOJ entered into the record inadequate Declarations, Plaintiff was not in a position to fully challenge the Declarations on the missing information, and the DOJ knew this. This fits into the pattern and practise of the DOJ's misconduct during proceedings before this Court.

To deny Plaintiff's request for Discovery, the Chief Magistrate had to accord the presumption of good faith to Declarations that she later found inadequate. Because the Chief Magistrate Judge is according the presumption of good faith to Declarations later found inadequate, the Court must reject the Report and Recommendation based on this error. Once this error is acknowledged by the Court, the Court must review *de novo* Plaintiff's request to conduct limited discovery -- not, as the Chief Magistrate Judge wrongly described, to enlarge the First FOIA Request -- but, rather, to obtain information and facts needed to resolve the absence of or disputes in material facts in this litigation.

The Chief Magistrate Judge also blamed Plaintiff for not being able to make a showing that the DOJ has deliberately engaged in bad faith acts throughout this litigation.

" . . . [P]laintiff makes no showing -- other than his own assumptions, . . . 'that the [G]overnment's initial inability to locate documents was the result of bad faith as opposed to mere administrative error[.]' " (Dkt. No. 48 at 31). The Chief Magistrate Judge was responsible for having placed Plaintiff at a legal disadvantage when the Chief Magistrate Judge denied Plaintiff's request to conduct limited discovery in this litigation to determine : (i) The timing and chronology of DOJ's decision-making process ; (ii) The veracity of the DOJ's claims it never received the First FOIA Request or that the DOJ misplaced the request file ; and (iii) The veracity of the DOJ's claims that George never had a copy of the United States Attorneys' Manual. (Dkt. No. 24 at 41). As a consequence of the Chief Magistrate Judge's refusal to allow Plaintiff to conduct this very limited discovery to show bad faith, the Chief Magistrate Judge made sure that Plaintiff would be unable to demonstrate bad faith. Because of the Chief Magistrate Judge's circular reasoning, the Court should reject the Report and Recommendation.

The Chief Magistrate Judge also rejected Plaintiff's claims that the DOJ made misrepresentations and altered evidence. (Dkt. No. 48 at 30-1). In doing so, the Chief Magistrate Judge cited case law in the WestLaw database system about how late responses are insufficient to prove bad faith -- the same WestLaw database system cases to which the *pro se* Plaintiff has no access. For example, Plaintiff can only access a digest of the *Conti* case law that was cited to dismiss Plaintiff's claims of bad faith acts as "speculative."[6/] In the memorandum supporting Plaintiff's Motion for Partial Summary Judgment, Plaintiff noted that he did not have access to WestLaw and that he was relying, at times, on digests of cases. (Dkt. No. 24 at 23, n.12). In other passages of the Report and Recommendation, the Chief Magistrate Judge cited other cases from the WestLaw database system, like when the Chief Magistrate Judge discussed "the four corners" argument *vis-à-vis* Plaintiff's Index of References to Records Requested under FOIA Request. *Id*. at 22-3, n.12. A summary of the *Judicial Watch II* case cited by the Chief Magistrate Judge is only available on the DOJ

6/ See U.S. Department of Justice, *Conti v. DHS, No. 12-5827, 2014 WL 1274517 (S.D.N.Y. Mar. 24, 2014) (Torres, J.)*, (Mar. 24, 2014),https://www.justice.gov/oip/conti-v-dhs-no-12-5827-2014-wl-1274517-sdny-mar-24-2014-torres-j.

Web site.[7/] The Chief Magistrate Judge never provided case law to Plaintiff that are unreported or reported exclusively on computerized databases, in accordance with Local Civil Rule 7.2, revealing a procedural error. Local Rule § 7.2. The few copies of WestLaw case decisions have been provided by Counsel for the DOJ. These two critical missing WestLaw cases are not amongst the two Rule 7.2 Statements provided to Plaintiff by Counsel for the DOJ. Because the Plaintiff was placed in an outright disadvantage to review case law that critically supports the recommendations of the Chief Magistrate Judge, the Court must reject the Report and Recommendation.

The Chief Magistrate Judge notably justified the DOJ's withholding of its working law on the basis that Plaintiff was trying to amend the First FOIA Request "to encompass an entirely new category of documents." (Dkt. No. 48 at 28, n.17). The characterization given by the Chief Magistrate Judge to the working law as "an entirely new category of documents" is not supported by the record. Four items within the first category of documents the First FOIA Request would apply to working law :

> C. limits, rules, procedures, or other guidelines that must or should be taken into consideration before, during, and after the prosecution of activists to mimimise the interference with First Amendment rights, other Constitutional rights, civil liberties, and other civil rights of activists ;
>
> D. consideration of other circumstances, conditions, and restrictions that form any part of the decision to target activists for prosecution ; and, if such considerations exist, under what circumstances, under what conditions, and subject to what restrictions ;
>
> E. any and all agency, executive, judicial, or congressional reports, memoranda, records, and information, which provide any description of the process for the determination as to whether activists can be targeted for prosecution ; and
>
> F. whether agencies other than the Department of Justice may target activists for prosecution, and, if so, under what circumstances, under what conditions, and subject

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7/ *See* U.S. Department of Justice, *Judicial Watch, Inc. v. Dep't of State, No. 15-690, 2016 WL 1367731* (D.D.C. Apr. 6, 2016) (Collyer, J.), (Apr. 6, 2016), https://www.justice.gov/oip/judicial-watch-inc-v-dept-state-no-15-690-2016-wl-1367731-ddc-apr-6-2016-collyer-j.

> to what restrictions ; and which agency officials approve of such prosecution of activists.

(Dkt. No. 12 at Ex. II to Ex. C at 3). The only way that the Chief Magistrate Judge would find that the DOJ's working law would not be responsive to the First FOIA Request would be to unlawfully construe the First FOIA Request to only four categories, and not to all the 18 items listed on the First FOIA Request. Because the Chief Magistrate Judge's unlawfully narrow reading of the First FOIA Request omits the above four descriptions of documents (as well as the balance of the 18 items listed on the First FOIA Request), these omissions are material to the Chief Magistrate Judge reaching an incorrect conclusion based on the facts and evidence about working law *vis-à-vis* the First FOIA Request. As a consequence of the Chief Magistrate Judge's unjust conclusion about working law, the Court must reject the Report and Recommendation.

The Chief Magistrate Judge deliberately ignored documentation provided by Plaintiff to the Chief Magistrate Judge that made a showing that bad faith acts were committed by the DOJ. As explained in more detail in the memorandum in support of Plaintiff's Motion for Sanctions and in Plaintiff's objection to the Declaration of Daniel F. Van Horn, Counsel for the DOJ introduced a document that was shown to be altered ; Defendant claimed to have lost the First FOIA Request after Plaintiff's Counsel filed the FOIA Appeal ; Counsel for the DOJ made misrepresentations, including that no responsive records existed, even though the DOJ would later produce responsive records ; produced inadequate Declarations ; conducted bad faith searches ; George and Chief of the Civil Division Daniel F. Van Horn stated that they did not have copies of, or claimed ignorance of, the United States Attorneys' Manual, and on and on. (Dkt. Nos. 25 generally, 43 at 7). To make such claims, Plaintiff cited documents in the record. Plaintiff's claims are not "contrived and speculative," as claimed by the Chief Magistrate Judge in the Report and Recommendation. (Dkt. No. 48 at 31). As a consequence of the Chief Magistrate Judge's baseless conclusions, the Court should reject the Report and Recommendation.

Furthermore, according to information obtained by Progress Queens, the online news publication published by Plaintiff, the U.S. Attorney's Office for the Southern District

of New York uses applications named Concordance and IPRO to manage digital documents. The Declaration of Daniel F. Van Horn is silent as to whether the U.S. Attorney's Office for the District of Columbia uses any applications to store, retrieve, or manage digital documents. (Van Horn Decl., ¶ 10). Just because Declarant Daniel F. Van Horn could not use either RCIS or LIONS to replicate a digital document management system does not let the DOJ off the hook from searching whatever digital document management system it does have, whether those records be guidelines, procedures, policies, or protocols -- and/or working law. What is more, Declarant Daniel F. Van Horn used the recollections of other employees of the U.S. Attorney's Office for the District of Columbia to try to determine whether guidelines exist in digital format. Using the recollections of others should not be accepted by this Court as an inferior facsimile for having conducted an actual search of any digital document management system, or for other DOJ employees to provide Declarations in their own name. Clarification is in order as to whether the U.S. Attorney's Office for the District of Columbia should be ordered to conduct a search for records responsive to the First FOIA Request from any digital document management system used by the DOJ. Furthermore, because the Court ordered that Main Justice conduct a search for records, then Main Justice should be compelled to conduct a search of its digital management system, particularly since the DOJ never provided a Declaration for the search. (Dkt. No. 14). As a consequence of the Chief Magistrate Judge's errors, the Court should reject the Report and Recommendation.

V. The Chief Magistrate Judge disregarded the standard used to determine when the Freedom of Information Act ('FOIA') compels an agency to disclose its working law.

Under the working law doctrine, agencies must disclose the rules and interpretations that constitute their formal or informal policy. *See Brennan*, 697 F.3d 184, 195-96, 199-202. This includes an agency's opinion about "what the law is" and "what is not the law and why it is not the law." *Tax Analysts II*, 117 F.3d 607, 617. An agency document constitutes working law, and thus must be disclosed, if it "has become" an agency's "effective law and policy." *Brennan*, 697 F.3d at 199 (quoting *NLRB v. Sears, Roebuck, & Co*., 421 U.S. 132, 153 (1975)) ("NLRB II") (emphasis added) ; *see Coastal States*

Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) ("[T]o prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it."). Crucially, the working-law doctrine does not require that a position expressed in a document be "absolutely binding" on an agency; it need only reflect a "settled and established policy." *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2010). Similarly, legal interpretations "routinely used" and "relied on" fall within the definition of working law. *Coastal States*, 617 F.2d at 869. If the DOJ does not have written guidelines, procedures, policies, or protocols about the prosecution of activists, then the DOJ must be compelled to disclose its working law. Because the Chief Magistrate Judge refused to compel the DOJ to produce its working law, the Report and Recommendation must be rejected.

The position taken by the Chief Magistrate Judge is that the "DOJ performed an adequate search in response to [P]laintiff's request for '[a]ll records and information pertaining to the legal basis [for] prosecuting activists . . . who engage in protests[,]' including Mr. Choi. " (Dkt. No. 48 at 25). This position is unsupported by the record. Plaintiff argued in the memorandum supporting his Motion for Partial Summary Judgment that FOIA compels the DOJ to disclose its working law. (Dkt. No. 24 at 20-1). The DOJ has not invoked any Exemption to any documents that describe its working law for the prosecution of activists, and the Report and Recommendation shows no citation for such a claim. Plaintiff has time and again brought to the Chief Magistrate Judge's attention that the DOJ has at times relied upon an analysis of the law or other information that leads to the arrest, and later prosecution, of activists. Such examples of documents have been disclosed by the DOJ during the course of this litigation. *See, e.g.*, the "Myers memo (email)" and "Capt. Guddemi's November 22 email." (Flores Decl., Ex. G at Tabs A and B).

In Plaintiff's memorandum in support of his Motion of Partial Summary Judgment, Plaintiff further argued that, "For example, when local prosecutors drop charges or fail to bring charges against activists, the U.S. Attorneys' Office must make a prosecutive determination in respect of bringing Federal criminal charges against activists. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881."

(Dkt. No. 24 at 22). Under these guidelines here, the DOJ would have to disclose the working law to make prosecutorial determinations. Plaintiff has argued that, "As the Second Circuit has emphasized, 'the ''working law" analysis is animated by the affirmative provisions of FOIA,' which require agencies to disclose their operative rules and interpretations to the public. *Brennan*, 697 F.3d at 200, 202 ; see 5 U.S.C. § 552 (a)(1)– (2)," adding that, "Importantly, it is not Plaintiffs' burden to show that the materials are working law or have been adopted as a final agency position ; rather, as under FOIA generally, it is DOJ's burden to show that an exemption properly applies. *See Brennan*, 697 F.3d at 201-02." (Dkt. No. 24 at 20-1). Because the Chief Magistrate Judge deliberately overlooked Plaintiff's arguments that the DOJ must disclose records that are highly likely to exist, records that are highly likely to serve as working law, records for which no Exemption has been claimed, the Court must not accept the Report and Recommendation, and, instead, conduct a *de novo* review of this and all of the other issues being raised in Plaintiff's instant objections and in Plaintiff's dispositive motions and briefs.

VI. The Chief Magistrate concluded that the DOJ does not have to produce any records of costs, as requested in the First FOIA Request.

Regarding costs requested in the First FOIA Request, the position of the Chief Magistrate Judge was frivolous in reaching a conclusion against the disclosure of costs. Plaintiff requested records of the costs of the prosecution of Lt. Choi. (PL 56.1 Statement, ¶ 8(d)(i)(A)-(E)). The DOJ declared that no such records existed when it produced the Red Herring Response. (Flores Decl., Ex. F). Later, it was revealed that the DOJ had records of the costs, namely the costs that included all of the activists, who protested alongst with Lt. Choi, on the day he was arrested. (Kelly Decl., ¶ 22). Rather than make the DOJ undertake unnecessary work to calculate the portion of those costs associated with Lt. Choi, Plaintiff offered as a compromise to accept the costs revealed by the DOJ's search. (Flores Decl., Ex. I at ¶ 1h). However, using unfounded reasoning, the Chief Magistrate Judge concluded that it was "adequate" for the DOJ to withhold the records that the DOJ admitted existed and that Plaintiff had offered to compromise to accept. (Dkt. No. 48 at 24-5). During Oral Arguments, there was confusion by the Chief Magistrate Judge that Plaintiff tried to clear-

up about the Government's withholding of the costs. Transcript of Proceedings Held on July 11, 2016 (July 25, 2016) ("7/11/16 Tr."). (Dkt. No. 35 at 39:15–22). On the matter of costs, the Chief Magistrate Judge ruled that the DOJ did not have to produce records that the DOJ has admitted it has easy access to, because, "FOIA imposes no obligation on DOJ to look beyond the four corners of plaintiff's request" (Dkt. No. 48 at 30). The Chief Magistrate Judge made this decision, even though during Oral Arguments it was Her Honor's impression that the Government had offered to provide the total costs being sought by Plaintiff as a compromise. Because the Chief Magistrate Judge refused to accept a compromise that would facilitate the ready disclosure of existing records about costs, the Court must reject the Report and Recommendation.

Despite the Chief Magistrate Judge's own acknowledgment that the DOJ has never explained why the DOJ waited over two years to answer the First FOIA Request, delayed its other responses, made representations that no responsive records existed only to provide responsive records following the Orders of the Chief Magistrate Judge, the Chief Magistrate Judge's ultimate recommendation to Plaintiff is to file another FOIL request. (Dkt. No. 48 at 30). The Chief Magistrate Judge knows, given the DOJ's pattern and practise to delay responding to FOIA requests until FOIA requests enter litigation, that the Chief Magistrate Judge's ultimate recommendation would only invite more litigation. This is no solution at all, and it should shock the conscious of the Court that the Chief Magistrate Judge would make a callous recommendation. The Court cannot countenance this kind of circular, failed logic. As a consequence of the Chief Magistrate Judge's errors and logical fallacies, the Court should reject the Report and Recommendation.

VII. The Chief Magistrate Judge determined, without giving any consideration to the doctrine that working law must be disclosed, that the DOJ had made a good faith search to answer the First FOIA Request.

The position of the Chief Magistrate Judge is unsupported by the record. The Chief Magistrate Judge found that "affirmative evidence of good faith is present here in DOJ's voluntary disclosures." (Dkt. No. 48 at 32). However, the DOJ has not voluntarily made disclosures. The only time the DOJ made meaningful disclosures of records was following the issuance of orders written by the Chief Magistrate Judge. After Plaintiff performed due

diligence of the Red Herring Response, Plaintiff produced an index of records that showed the DOJ made an incomplete production of documents. Plaintiff noted in Plaintiff's Index to the First FOIA Request that there were references to the kinds of records that Plaintiff had been seeking, but that the DOJ had intentionally withheld. (Dkt. No. 12 at Ex. B). Plaintiff also produced an index of the kinds of records that Plaintiff was seeking ('Plaintiff's Index of References to Records Requested under FOIA Request'). (Flores Decl., Ex. L).

Following the Initial Conference, the Chief Magistrate Judge issued an order (the 'Omnibus Order') for the production of "at least some of the documents listed" on Plaintiff's Index of References to Records Requested under FOIA Request. (See Dkt. No. 14). In response to the Omnibus Order, the DOJ produced the Second FOIL Response. (Flores Decl., Ex. G). Following Oral Arguments of the briefs, the Chief Magistrate Judge issued another order (the 'Oral Argument Order'). (Dkt. No. 37). In response to the Oral Argument Order, the DOJ produced a letter, dated 24 August 2016, attached to which was the Declaration of Daniel F. Van Horn (the 'Fourth FOIL Response'). None of the FOIL responses following the making of the Red Herring Response would have been made by the DOJ, but for the orders issued by the Chief Magistrate Judge.

Furthermore, the Court has already ruled in Plaintiff's favour, when the Court ordered the DOJ to conduct a search of Main Justice and to produce at least some of the records on Plaintiff's Index of References to Records Requested under the FOIA Request. The Court's ruling in favour of Plaintiff carries significant weight. The Court of Appeals for the District of Columbia has ruled that " 'agencies [may] not make new [E]xemption claims to a [D]istrict [C]ourt after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.' " *See Senate of P.R. v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980)). *See also Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) ('Tax Analysts III') (refusing to revisit issue of attorney-client privilege, because the Court ruled on attorney-client privilege issue in previous opinion), aff'd in pertinent part, rev'd in part, 294 F.3d 71 (D.C. Cir.). Because the DOJ has not invoked any Exemptions to Plaintiff's Index of References to Records Requested under

the FOIA Request, all of the documents listed on the Plaintiff's Index of References to Records Requested under the FOIA Request must be produced by the DOJ. (Dkt. No. 24 at 13-14). Because the Chief Magistrate Judge overlooked the DOJ's obligation to produce records for which it has not invoked an Exemption, the Court should seriously reject the Report and Recommendation.

Furthermore, in the memorandum in support of Plaintiff's Cross-Motion for Sanctions, Plaintiff respectfully requested that the Chief Magistrate Judge consider Rule 52(a)(6), and set aside some of the findings in each of the Omnibus Order and its Memorandum and Order. (Dkt. No. 25 at 8). Fed. R. Civ. P. 52(a)(6). When the Chief Magistrate Judge ruled against Plaintiff's motions, the Chief Magistrate Judge committed this Court to the Chief Magistrate Judge's ruling that the DOJ must produce records from Plaintiff's Index of References to Records Requested under the FOIA Request. Since the DOJ has not invoked any Exemptions to Plaintiff's Index of References to Records Requested under the FOIA Request, all of the documents must be produced if the Court accepts the Report and Recommendation.

The search for records conducted by the DOJ was also not made in good faith, because the DOJ ignored names of activists other than Lt. Choi, which were provided in the First FOIA Request and which were identified in the Complaint to guide the DOJ to provide responsive documents to the items of requests lists on the First FOIA Request. (PL. 56.1 Answer, ¶ 40). In all the time when the DOJ was in possession of the First FOIA Request, the Complaint, and the Plaintiff's Index of References to Records Requested under the FOIA Request, the DOJ could have searched the names of the other activists to locate records that were requested in the First FOIA Request. But the DOJ failed to conduct searches for all of the names of the activists that were provided. Because the DOJ failed to conduct searches for records for guidelines, procedures, policies, and/or protocols for the prosecution of the other activists, that failure to search was material to demonstrate that the DOJ did not conduct good faith searches.

The Chief Magistrate Judge has made an unnecessarily cramped reading of the First FOIA Request by stating that, "[Lt]. Choi is the only individual named in the operative

language of the Request." (Dkt. No. 48 at 22). The First FOIA Request was nine (9) pages long. (Dkt. No. 12 at Ex. II to Ex. C). The names, identities, or descriptions of seven total activists or groups of activists were provided in First FOIA Request in order to help the DOJ conduct searches for the kinds of records being requested in the First FOIA Request. (PL 56.1 Answer ¶ 40). (Dkt. No. 12 at Ex. II to Ex. C). However, the Chief Magistrate Judge has unjustly narrowed the scope of the First FOIA Request. Whilst it is true that the First FOIA Request sought records about the Government's prosecution of Lt. Choi, the 18 items that comprised the request sought general documents about the Government's guidelines, procedures, policies, or protocols for prosecuting activists. Were the Government acting in good faith, the Government could have produced guidelines, procedures, policies, or protocols for other activists as a compromise or in lieu of Lt. Choi. But the Chief Magistrate Judge never made a reasonable inference about how the names of other activists could have helped the DOJ locate records about guidelines, procedures, policies, or protocols for prosecuting activists.

Furthermore, the position of the Chief Magistrate Judge that excused the DOJ for having failed to search for records for the other activists was based on a case that doesn't begin to support the principles for which it was being applied. In the Report and Recommendation, the Chief Magistrate Judge determined that :

> [D]efendant had no obligation to look beyond the four corners of the Request or to conduct searches based on [P]laintiff's subsequent efforts to clarify the Request. *See Judicial Watch II*, 2016 WL 1367731, at *3; *Vietnam Veterans*, 8 F.Supp.3d at 203–04; *Amnesty Int'l*, 2008 WL 2519908, at *13 (holding that agencies need not search for names that 'were not actually mentioned in the [FOIA] Request[,]' but rather 'were mentioned in materials cited in a footnote of the Request')."

(Dkt. No. 48 at 22, n.12). However, the names of the other activists were not in footnotes. The names, identities, or descriptions of the other activists were within the body of the First FOIA Request, the Complaint, and Plaintiff's Index of References to Records Requested. It is also materially false that all of the names of the other activists were beyond the four corners of the First FOIA Request. The union of the First FOIA Request, the Complaint, and Plaintiff's Index of References to Records Requested share the names or descriptions of these activists commonly :

- Lt. Daniel Choi. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 1). (Dkt. No. 15 at 2). (Flores Ex., Ex. L, ¶ 5).
- Aaron Swartz. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 2). (Dkt. No. 15 at 5). (Flores Ex., Ex. L, ¶ 10).
- PFC Chelsea Manning. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 2). (Dkt. No. 15 at 9). (Flores Ex., Ex. L, ¶ 25).
- HIV/AIDS activists arrested in Washington, D.C. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 6). (Dkt. No. 15 at 10). (Flores Ex., Ex. L, ¶ 26).
- Activists from Chicago and Minneapolis (the 'Midwest peace activists' or the 'Midwest anti-war activists'). *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 7). (Dkt. No. 15 at 11). (Flores Ex., Ex. L, ¶ 28).

None of these names appear in footnotes. It is important to note that the DOJ has not invoked any Exemptions in respect of these activists. Moreover, Defendant has already disclosed some records about some of these activists, confirming that the agency has an interest in the prosecution of activists. Because the DOJ has an interest in prosecuting activists, and, in particular, these activists, the records for these activists must be disclosed. As a consequence of the Chief Magistrate Judge's determination to unjustly make a cramped reading of the First FOIA Request, the Court should reject the Report and Recommendation.

To further support the problematic and unlawfully narrow reading of the First FOIA Request, the Chief Magistrate Judge accepted statements made by Declarant Daniel F. Van Horn about the Oral Arguments for which he was not present, statements that were not made by the Declarant but instead made by Plaintiff, and the color and tenor of the opinions made by the Declarant of Plaintiff's statements show that Plaintiff's statements were taken out of context. (Dkt. No. 48 at 23, n.13). The Court accepted the Declarant's misrepresentation of Plaintiff's statements over Plaintiff's objection in the Report and Recommendation. (Dkt. No. 43 at 4-5). Despite knowing better, the Chief Magistrate Judge relies upon this construct to narrow the First FOIA Request unfairly in order to accept the DOJ's misconduct as acceptable under FOIA. The Court must reject this treatment by rejecting the Report and Recommendation.

Plaintiff directs the Court to the specific place in the records, where there are facts that support Plaintiff's arguments. When Defendant produced the Second FOIA Response, Defendant included guidelines from the United States Attorneys' Manual applicable to "demonstrations." (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.880-82. The DOJ also produced other records from the United States Attorney's Manual in the Second FOIA Response. (Flores Decl., Ex. G at Tabs E and G). We know from the few responsive records produced by the DOJ that when the Federal Bureau of Investigation ("FBI") begins an investigation of activists under one of the DOJ's guidelines, the FBI will consult with an U.S. Attorney. Investigative decisions are made by U.S. Attorneys. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. Decisions, determinations, and interpretations of laws that lead to the prosecution of activists are records responsive to the First FOIA Request, because this would be working law, or agency law. Under the same section, there is legal advice given to the DOJ by the U.S. Department of State about criminal charges being disposed under local law. *Id.* In Plaintiff's memorandum in opposition to Defendant's motion for summary judgement, Plaintiff argued that the guidance provided by the U.S. Department of State to the DOJ under § 9-65.881 of the United States Attorneys' Manual applicable to "demonstrations" is responsive to the First FOIA Request. (Pl. Opp. Mem. at 37). When the Court entered its Oral Arguments Order, the Court ordered that the DOJ conduct a search for records regarding the term " 'demonstration' and variants thereof." (Dkt. No. 37 at 2). Under the Oral Arguments Order, the DOJ should have produced the legal advice from the DOS. Despite Plaintiff's argument and the Court's Oral Arguments Order, the DOJ has refused to produce the communication from the U.S. Department of State that determines why "most conduct in possible violation of [18 U.S.C. § 970] is more appropriate for disposition under local law." *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. The Court must reject the Report and Recommendation and compel production of the communication from the U.S. Department of State and all associated records.

Knowing Plaintiff's arguments and knowing the Court's Order, Defendant allowed Declarant Daniel F. Van Horn to enter a Declaration into the Court's record that deliberately omits any mention of legal guidance that is applicable to U.S. Attorneys in respect of the prosecution of individuals, who participate in demonstrations. Besides George, now Declarant Daniel F. Van Horn has claimed ignorance aboout the United States Attorneys' Manual. Because Counsel for the Government allowed this Declaration to be entered into the Court's record, Counsel for the Government must now be found to have acted in bad faith, in accordance with Rule 56(h). Fed. R. Civ. P. 56(h). Consequently, the Court must reject the Report and Recommendation and must rule on Plaintiff's Cross-Motion for Sanctions.

VIII. The Chief Magistrate Judge did not analyse the devastating implications on FOIA of DOJ's admissions that it does not comply with FOIA until a Court orders compliance.

The position of the Chief Magistrate Judge is only going to further weaken FOIA, and the Court cannot accept this kind of jurisprudence. In the Report and Recommendation, the Chief Magistrate Judge noted that, " ' The basic purpose of FOIA is to ensure an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed. ' *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)." The Chief Magistrate Judge then proceeded to gut FOIA, like when the Chief Magistrate Judge stressed that under FOIA, "There is no requirement that an agency search every record system . . . ." (Dkt. No. 48 at 26). There are two problems with the Chief Magistrate Judge's focus on this loophole. First, Plaintiff never asked the DOJ to search every record system. Plaintiff appears *pro se* in this litigation, and Plaintiff only knows of two other possible systems under which Defendant may search. In Plaintiff's objections to the Declaration of Daniel F. Van Horn, Plaintiff stated that, "According to information obtained by Progress Queens, the online news publication published by Plaintiff, the U.S. Attorney's Office for the Southern District of New York uses applications named Concordance and IPRO to manage digital documents." (Dkt. No. 43 at 2). Because of the DOJ's own admitted limitations (RCIS or LIONS cannot act as document management systems), Plaintiff suggested that a search of the document management systems was in

order. *Id*. at 2-3. Because the Chief Magistrate Judge failed, for unknown reasons, to give weight to Plaintiff's request, the Court must reject the Report and Recommendation.

If the Chief Magistrate Judge were in charge of compelling agencies to comply with FOIA, no responsive records would ever be disclosed, lawsuits would be filed, and the Chief Magistrate Judge would recommend that Plaintiffs file more FOIA requests. Plaintiff has brought to the Chief Magistrate Judge's attention that the DOJ had an established pattern and practise of violating FOIA. (PL 56.1 Answer ¶¶ 84-93). This pattern and practise has been noted by the mainstream media. However, the Chief Magistrate Judge gave short shrift to the reliably-sourced news articles and other information Plaintiff noted for the Court. There is objective reason to believe that the DOJ refuses to comply with FOIA. Yet, the Chief Magistrate Judge refused to consider this as evidence. Because the Chief Magistrate Judge refused to consider evidence that the DOJ is not in compliance with FOIA, the Court must reject the Report and Recommendation.

In addition to the above issues with the Declaration of Daniel F. Van Horn, Declarant Daniel F. Van Horn made a fatally-flawed representation : Since neither he nor George claim to know about written guidelines that determine how the Government balances the First Amendment rights of activists when prosecuting activists for their activism, then he reasoned that no such guidelines exist. But this unreasoned conclusion has been shown to be demonstratively false. The Government has produced working law that demonstrates that Federal prosecutors rely upon interpretations of laws and situations to prosecute activists for their activism. *See* the "Myers memo (email)" and "Capt. Guddemi's November 22 email." (Flores Decl., Ex. G at Tabs A and B). The Government has also acknowledged procedures that likely have generated records about the prosecution of activists, notably in the United States Attorneys' Manual. However, the DOJ is and has been unwilling to acknowledge the existence of documents responsive to the First FOIA Request and the Second FOIA Request, and the DOJ provided a No Number, No List response for all of the withheld records, including for the Exempted Records. As argued in Plaintiff's opposition memorandum, under the working-law doctrine of FOIA,

agencies must disclose the rules and interpretations that constitute their formal or informal policy. (Dkt. No. 24 at 20).

As improbable as it may seem, were the Court to take the DOJ at its word -- that no general guidelines for the prosecution of activists exist (which is in doubt, given the guidelines in the Unites States Attorneys' Manual that identify the communication from the U.S. Department of State) -- then the DOJ must provide its working law documents, as it did when it produced the "Myers memo (email)" and "Capt. Guddemi's November 22 email" that the Government used to prosecute activists. (Flores Decl., Ex. G at Tabs A and B). Plaintiff already provided examples of names of activists in the First FOIA Request, in the Complaint, and in the Plaintiff's Index of References to Records Requested under FOIA Request. (Dkt. No. 12 at Ex. I to Ex. C). (Dkt. No. 15). (Flores Ex., Ex. L). As noted in Plaintiff's opposition memorandum, when the Court ordered the DOJ to conduct a search of Main Justice and to produce at least some of the records on Plaintiff's Index of References to Records Requested under the FOIA Request, that Order now prevents the DOJ from invoking any exemption to the records being requested. (Pl. Opp. Mem. at 13-14). Furthermore, even in the absence of general guidelines that the DOJ claims it does not have, the DOJ somehow prosecuted all the activists listed on Plaintiff's Index of References to Records Requested under the FOIA Request. Using what interpretations of law did the DOJ use to prosecute all those activists ? These are records that exist that the DOJ must now produce without the ability to invoke any Exemption. Because the Chief Magistrate Judge overlooked this aspect of the litigation, the Court must reject the Report and Recommendation.

Plaintiff hoped that, by providing examples of names of other activists, who had been prosecuted for their activism, it would make it easier for the DOJ to locate and produce the working law for these prosecutions. (PL 56.1 Answer ¶ 40). But such is the DOJ's resistance to voluntarily complying with FOIA, to disgorge its working law, that the DOJ has refused to provide the interpretations of law used to prosecute the activists on Plaintiff's Index of References to Records Requested under the FOIA Request. Consequently, in the alternative to providing general guidelines, which, as the DOJ claims,

may not exist, with the notable exception being the communication from the U.S. Department of State as identified in the United States Attorneys' Manual, then the DOJ must produce the equivalent of the "Myers memo (email)" and "Capt. Guddemi's November 22 email" for all of the activists that Plaintiff has identified in the record of the proceedings before this Court, so that the public can benefit from the disclosure of the DOJ's working law applicable to the specific prosecution of activists. *See also U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881.

The position of the Chief Magistrate Judge in the Report and Recommendation lacked factual basis, according to the record before this Court. For example, the Chief Magistrate Judge noted in the Report and Recommendation that Plaintiff complained in his Cross-Motion for Sanctions that "[D]efendant's bad faith is evident because 'its posture regarding FOIA is that once an agency makes a response, that that delayed response is not standing for a bad faith act[,]' and 'because the Government refuses to comply with FOIA until a court enters an order.' " (Dkt. No. 44 at 13-4). The Chief Magistrate Judge then concluded that, "Because defendant has submitted declarations sufficient to establish a presumption that DOJ conducted an adequate search for records, the burden shifts to plaintiff to 'make a showing of bad faith on the part of the agency sufficient to impugn [those] declarations[,]' which are accorded a presumption of good faith," adding that, "Plaintiff has not met this high burden." (Dkt. No. 48 at 30). However, the Chief Magistrate Judge has overlooked how each time the DOJ produced records that were actually responsive to the First FOIA Request, the DOJ did so after it had certified that no responsive records existed. The DOJ has serially made such statements or provided such certifications, that no responsive documents exist, numerous times, only later to be contradiction by the disclosure of response records, as evidenced by this partial time-line :

- By cover letter, dated 19 August 2015, when the DOJ made the Red Herring Response.
- On 16 September 2015, at the Initial Conference, when Counsel for Defendant said that no responsive records existed.
- By cover letter, dated 23 November 2015, the DOJ produced the Declarations of Karin Kelly and Principa Stone. In one Declaration, the DOJ described the search regarding RCIS and LIONS. (Kelly Decl., ¶ 10-5)

- By cover letter, dated 13 October 2015, the DOJ produced the Second FOIA Response that included responsive records. (Flores Decl., Ex. G).
- On 23 November 2015, when the DOJ declared, "There can be no withholding when, as in this case, no responsive documents exist," in its Memorandum in support of its Motion of Summary Judgment. (Dkt. No. 20 at 5).
- On 11 July 2016, at the Oral Arguments, Counsel for Defendant amended the description of the search regarding RCIS and LIONS. The Chief Magistrate Judge noted this amendment in the Report and Recommendation. (Dkt. No. 48 at 14).
- By cover letter, dated 24 August 2016, the DOJ produced the Declaration of Daniel F. Van Horn, which included responsive documents. (Van Horn Decl.)

The Chief Magistrate Judge excused the DOJ's misconduct in producing very late responses to the First FOIA Request by stating, in relevant part, that, "Mere delay in responding to a request is not evidence of bad faith . . . ." (Dkt. No. 48 at 21). The DOJ's misconduct also includes the production of very late responses *after* the DOJ had declared that no more responsive records existed, *meaning that* the DOJ was filing false instruments with the Court, containing false statements or certifications all along, stating that there were no responsive records. Yet, the DOJ would go on to produce responsive records. The negative consequences of the DOJ's delay tactics were compounded by the DOJ having made misrepresentations to the Court about the purported non-existence of responsive records. FOIA should not be allowed to be weakened by such misconduct by an agency.

Furthermore, as Plaintiff has demonstrated by exhibits submitted from mainstream media reports, the Government refuses to comply with FOIA until litigation commences and is compelled into compliance by the Courts.[8/] The failings in the Declaration of Daniel F. Van Horn show that the DOJ is still engaged in a pattern of delay with the Courts. In Plaintiff's memorandum supporting his Cross-Motion for Sanctions, Plaintiff argued that the Court had inherent discretion to order sanctions against a party that had been engaging in a pattern of bad faith. (Pl. Mem. at 12). Plaintiff now points the Court to Rule 56(h) for additional legal authority available to the Court to find that the

8/ *See, e.g.*, Hadas Gold, *NYT, Vice, Mother Jones top FOIA suits*, Politico (Dec. 23, 2014), http://www.politico.com/blogs/media/2014/12/nyt-vice-mother-jones-top-foia-suits-200325.html (noting that the top defendant was the DOJ).

Declaration of Daniel F. Van Horn was submitted to the Court in bad faith. Rule 56(h) is also available to the Court to address the suspect exhibit submitted into the record in the Declaration of Rukhsanah Singh, an issue raised in Plaintiff memorandum for sanctions. (Pl. Mem. at 34). Fed. R. Civ. P. 56(h). The Court must take action to shore up FOIA, not tear it down.

In respect of the DOJ's late amendment to the Declarations in respect of the process used to search RCIS and LIONS, that late information was not provided to Plaintiff during the schedule when dispositive motions were being filed. Thus, Plaintiff lost an opportunity to raise issues about the process used to search RCIS and LIONS. All of the times when the deliberate acts of misconduct by the DOJ placed *pro se* Plaintiff at a disadvantage during dispositive motion practise were of no consideration to the Chief Magistrate Judge. As a consequence of the Chief Magistrate Judge's errors, and the net effect of the Chief Magistrate Judge's recommendations that only serve to weaken FOIA, the Court should reject the Report and Recommendation.

IX. The Chief Magistrate Judge ignored the devastating implications on the First Amendment when the DOJ does not comply with FOIA.

The position of the Chief Magistrate Judge has given short shrift to the First Amendment issues in this litigation. Firstly, the Chief Magistrate Judge faulted Plaintiff for failing to describe how records being sought, including the "secret DOJ memo" (a/k/a the legal guidance from the DOS), "constitute a judicial document." (Dkt. No. 48 at 32, n.19). Plaintiff is appearing *pro se* in this litigation, and the precise legal citations escape his reach. However, it is must be plainly evident to the Court that during criminal proceedings, the Defense generally can conduct Discovery of investigators to determine the nature of evidence used against Defendants, and this includes investigators' interpretations of the evidence and the law. For example, when the DOJ recently restaffed the reported civil rights investigation of the homicide of Eric Garner, *The New York Times* reported that the reported target of the investigation would be able to call as witnesses investigators to

testify about "their interpretations of the evidence."[9/] Therefore, any DOJ documents that establish the predicate for the filing of criminal charges against activists -- and that includes the legal guidance from the DOS to the DOJ -- would receive treatment as judicial records in a criminal proceeding, and it is under the First Amendment treatment of those records that Plaintiff seeks such records. *See United States v. Erie Cnty.*, 763 F.3d 235, 240 or 241 (2d Cir. 2014) (noting that, a District Court has "inherent 'supervisory power over its own records and files,' *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), even the District Court's inaction is subject to public accountability. The public's ability to scrutinize such judicial decision-making helps assure its confidence in the orderly administration of justice."). Under this First Amendment legal theory of judicial records or judicial documents, Plaintiff requests the documents from the DOJ under the Free Speech FOIA Requests and under Plaintiff's Index of References to Records Requested under FOIA Request.

Secondly, in Plaintiff's Cross-Motion for Sanction, Plaintiff argued that there were negative First Amendment implications of the DOJ's refusal to comply with FOIA. (Dkt. No. 25 at 38-41). Defendant's position forces Plaintiff to either engage in speech that has been preapproved by the Government or else to refrain from speaking altogether, by virtue that Plaintiff, a journalist, is unable to report the complete truth about the Government's prosecution of activists. The Chief Magistrate Judge ignored these complaints in the Report and Recommendation. Plaintiff has been working on a follow-up article about the prosecution of activists, and Plaintiff has been holding-off on the publication of that follow-up article, because Plaintiff has incomplete information. Now that the Chief Magistrate Judge has issued the Report and Recommendation, Plaintiff will publish the follow-up article with incomplete information and use the Report and Recommendation as a source to explain the incompleteness of information. If the Eastern District accepts the Report and Recommendation, it would be the equivalent of the Eastern District tying cement blocks to the First Amendment and throwing it over the side of the Brooklyn Bridge. As a

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9/ *See* Alan Feuer, *Staffing Change in Eric Garner Inquiry Pushes It Into 'Strange Territory,'* The New York Times (Oct. 25, 2016), http://www.nytimes.com/2016/10/26/nyregion/staffing-change-in-eric-garner-inquiry-pushes-it-into-strange-territory.html.

consequence of the Chief Magistrate Judge's failure to recognise the negative First Amendment implications of the DOJ's refusal to release the duly requested documents under FOIA, the Court should reject the Report and Recommendation.

X. The Chief Magistrate Judge cast aspersions, or gave weight to aspersions cast by the DOJ, on *pro se* Plaintiff and did not treat the First FOIA Request with integrity.

The Chief Magistrate Judge has, in the record, accused the Plaintiff of englarging the scope of the litigation. (Dkt. No. 19 at 2). In the Report and Recommendation, the Chief Magistrate Judge described the litigation as "protracted." (Dkt. No. 48 at 21). The irony of the description of the litigation being "protracted" without assigning any responsibility for that on the DOJ for refusing to comply with FOIA was not lost on Plaintiff. The Chief Magistrate Judge has ascribed to the Plaintiff qualities of being "upset." (Dkt. No. 38 at 21). The Chief Magistrate Judge has also accused Plaintiff of continuing "this litigation to vent his disappointment with the results." (Dkt. No. 48 and 32). The Chief Magistrate Judge accused the plaintiff of using "conspiracy-minded assertions" to accuse the DOJ of engaging in a pattern and practise of refusing to answer FOIA requests. (Dkt. No. 48 at 31, n.18). However, on the last aspersion, the Chief Magistrate Judge, by Her Honor's own admission, noted that Plaintiff has demonstrated "an isolated (though lamentable) delay." *Id*. However, Plaintiff has introduced evidence that the DOJ has not only shown such treatment to Plaintiff. According to a news report published by POLITICO, "In all, more freedom of information lawsuits were brought against the federal government in 2014 than in any year since at least 2001, according to the FOIA Project. The top defendant was the Department of Justice and its various suborganizations, such as the FBI." (Flores Decl., Ex. EE). Plaintiff made extensive documentation about how the Government does not comply with FOIA until it is sued in Court. *See* Plaintiff's Cross-Motion for Sanctions. (Dkt. No. 25 at 28-31). The only way the Chief Magistrate Judge could reach conclusions that were not based on the record would be to cast aspersions on Plaintiff or on Plaintiff's arguments. By casting these aspersions, the Chief Magistrate Judge has recommended to this Court the disposal of a controversial FOIL request without having to rule against the DOJ. Indeed, in each of the Orders signed by the Chief Magistrate Judge that compelled the DOJ to produce

responsive records, the Chief Magistrate Judge only made recommendations, sometimes in footnotes, to nudge the DOJ to disclose responsive records after the DOJ, including its Counsel, made representations that no responsive records existed. (*See, e.g.*, Dkt. No. 14 at 2 ; 37 at 2). The Chief Magistrate Judge has given the appearance that the Chief Magistrate Judge does not want to rule against the DOJ. This kind of flawed jurisprudence is unbecoming for a U.S. Federal District Court, particularly one in New York.

The First FOIA Request submitted by Plaintiff addressed efforts by citizens to bring about reform in Government. (Dkt. No. 12 at Ex. II to Ex. C). When the DOJ performed subsequent searches of its systems to cure the inadequacy of its preliminary searches, amongst the keywords the DOJ used was "mutiny," as was noted in the Report and Recommendation. (Dkt. No. 48 at 15). The lawlessness ascribed by the DOJ to the nature of the First FOIA Request reveals how little respect the DOJ has for activists, and the Chief Magistrate Judge has not shown regard for the role of activists in our form of Government, possibly revealing prejudice. Is this how the Federal Courts treat *pro se* Plaintiffs, that the subject matter of FOIA requests are infused with prejudice ? As a consequence of the Chief Magistrate Judge's prejudice against Plaintiff and the subject matter of the litigation, the Court should reject the Report and Recommendation.

CONCLUSION

The thrust of the Report and Recommendation will allow the DOJ to continue to remain out of compliance with FOIA. Perversely, the Chief Magistrate Judge recommended the dismissal of Plaintiff Motion for Sanctions, thereby allowing the DOJ to face no consequence for violating FOIA. (Dkt. No. 48 at 33-34).

Only if an order is "clearly erroneous or contrary to law" may a U.S. Federal District Court Judge modify or set aside the order. *See* Fed. R. Civ. P. 72(a). *See also* 28 U.S.C. § 636(b)(1)(A). The Courts have said that an order can be shown to be clearly erroneous only when it can be concluded that the challenged decision is not "just maybe or probably wrong ; it must ... strike us with the force of a five-week-old, unrefrigerated dead fish." *See TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec.*, Inc., 866 F.2d 228, 233 (7th Cir. 1988)).

The Chief Magistrate Judge has been dismissive of Plaintiff's attempts to compel the DOJ to comply with FOIA. The Chief Magistrate Judge wants to restrict the First FOIA Request to only "the four corners" of the request, yet the Chief Magistrate Judge won't even compel the DOJ to answer all of the itemised requests on the First FOIA Request. The Chief Magistrate Judge demonstrated prejudice against *pro se* Plaintiff by setting forth facts and using Exhibits that could be inferred from the evidence to be incomplete or suspect. The Chief Magistrate Judge found that Plaintiff could not establish bad faith on the part of the DOJ, even though it was the Chief Magistrate Judge, who denied Plaintiff's request for limited Discovery in order to make the findings necessary to impose sanctions on the DOJ. The Chief Magistrate Judge's Report and Recommendation does irreparable harm to FOIA and to the First Amendment.

Plaintiff respectfully requests that the Court vacate the reference of the civil matter to the Chief Magistrate Judge, reject the Report and Recommendation, and decide *de novo* the issues objected to herein. *See* Fed. R. Civ. P. 73(b)(3). Because Plaintiff appears *pro se* and because of the limited time by which these objections must be filed and because of Plaintiff's limited legal knowledge, Plaintiff reserves his rights to add objections alongst the same or similar arguments made herein.

Respectfully submitted,

Dated : Jackson Heights, New York
03 November 2016

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, NY 11372
Phone : (929) 279-2292
louisflores@louisflores.com
Pro Se Plaintiff

Exhibit A

From: "Singh, Rukhsanah (USANYE)" <Rukhsanah.Singh@usdoj.gov>
Subject: Re: Flores v. DOJ (15-CV-2627) - Request for extension of time toobject
Sent date: 10/06/2016 11:54:04 AM
To: "Louis Flores"<louisflores@louisflores.com>

Mr. Flores,

I do not object to the request for an extension of time.

Rukhsanah Singh
Assistant U.S. Attorney

On Oct 6, 2016, at 11:43 AM, Louis Flores
<louisflores@louisflores.com<mailto:louisflores@louisflores.com>> wrote:

Dear Ms. Singh :

Here is your service copy. Pacer is not allowing me my first "free" copy read of filings right now for unknown reasons.

Thank you kindly.

Best regards,

--- Louis

Louis Flores
1 (718) 685-2924
louisflores@louisflores.com<mailto:louisflores@louisflores.com>

On Thu, 06 Oct 2016 11:13:08 -0400, Louis Flores
<louisflores@louisflores.com<mailto:louisflores@louisflores.com>> wrote:

Dear Ms. Singh :

I received today the Hon. Chief U.S. Magistrate Judge's report and recommendation. I am preparing a request for an extension of time of two weeks with which to file my objection.

Please let me know if you consent to my request for an extension of time. If I don't hear back from you before I send my request, I will note that I made a request for your consent, but that I had not heard back from you at the time of my filing.

Thank you kindly.

Best regards,

-- Louis

Louis Flores
1 (718) 685-2924
louisflores@louisflores.com<mailto:louisflores@louisflores.com>

On Wed, 6 Jul 2016 21:09:23 +0000, "Singh, Rukhsanah (USANYE)"
<Rukhsanah.Singh@usdoj.gov<mailto:Rukhsanah.Singh@usdoj.gov>> wrote:
Dear Mr. Flores,

You may contact the court to inquire if the hearing will be recorded.

Thank you,

Rukhsanah L. Singh

Assistant United States Attorney

U.S. Attorney's Office, Eastern District of New York

271 Cadman Plaza East, 7th Floor

Brooklyn, New York 11201

Telephone: (718) 254-6498

Fax: (718) 254-6081

From: Louis Flores [mailto:louisflores@louisflores.com]
Sent: Wednesday, July 06, 2016 4:51 PM
To: Singh, Rukhsanah (USANYE)
Subject: Flores v. DOJ (15-CV-2627) - Hearing on Monday

Dear Ms. Singh :

I have been notified by the chambers of the U.S. Magistrate Judge Roanne Mann that we have a hearing on Monday at 10 a.m. to provide argument for the motions.

Can your office supply a court reporter for this hearing ?

The last time we appeared before the U.S. Magistrate Judge, you said you did not remember our discussion during the Initial Conference. If your office can supply a court reporter, then we will have a record that we can both use to refer about the discussion during Monday's hearing.

Please confirm by tomorrow that you can arrange for a court reporter, or else I will ask the Court to supply one for me, since I am a pro se plaintiff.

Thank you kindly.

-- Louis

Louis Flores
1 (718) 685-2924
louisflores@louisflores.com<mailto:louisflores@louisflores.com>

<2016-10-06 Plaintiff Letter to Court (FINAL).pdf>

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS FLORES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

15-CV-2627 (JG)(RLM)

AFFIRMATION OF SERVICE

I, **LOUIS FLORES**, declare under penalty of perjury that I have served a copy of the attached **PLAINTIFF'S RESPONSE TO DECLARATION OF VAN HORN AND REQUEST FOR ENTRY OF JUDGMENT PURSUANT TO RULES 56 AND 58** upon **RUKHSANAH L. SINGH**, whose address is : c/o United States Attorney's Office, Eastern District of New York, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201 by **ELECTRONIC MAIL DELIVERY** to : rukhsanah.singh@usdoj.gov.

Dated : Jackson Heights, New York
03 November 2016

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, New York 11372
Phone : (929) 279-2292
louisflores@louisflores.com